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THE CASE FOR A CONSIDERED HIERARCHY OF DISCRIMINATION GROUNDS IN EU LAW

ERICA HOWARD*

ABSTRACT

The EU has legislation, based on Article 13 EC, against discrimination on the grounds of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation, but the protection provided is not the same for all these grounds. It can be said that this EU legislation creates a hierarchy of discrimination grounds, with racial or ethnic origin at the top, closely followed by sex, with religion or belief, disability and sexual orientation below this and age at the bottom. In this paper, I argue that this hierarchy is the outcome of political pragmatism, rather than of a deliberate consideration of the different grounds. I will suggest that a hierarchy is not necessarily wrong, but that a more considered decision should be made about which grounds need stronger protection. I propose an alternative way of deciding this question, using the distinction of suspect grounds made by the European Court of Human Rights under the ECHR.

Keywords: EU anti-discrimination law; Equal treatment directives; EU gelijke-behandelingsrecht; Richtlijnen gelijke behandeling; UE directives relatives à l'égalité; Discrimination grounds; Vormen van discriminatie

§1. INTRODUCTION

Article 13 EC empowers the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. In 2000, the European Union adopted two Directives based on this Article: the Race Directive and the Framework Directive.¹ These Directives were the first

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¹ Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] O.J. L180/22 (Race Directive); Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16 (Framework Directive).

This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and for the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

This is, according to Bell, 'an open-ended justification for any form of discrimination' that does not appear in the Race or the new Equal Treatment Directives (Directives 2002/73 and 2004/113). He writes that this 'may be aimed at reassuring national law makers (and the general public) that a ban on sexual orientation discrimination cannot be interpreted as according protection to paedophiles and other persons engaging in unlawful sexual behaviour', but that 'the breadth of the exception raises the possibility of an extended application'.⁴ Ellis mentions the same aim and concludes that the wording of the provision 'is wider than would be necessary to achieve this result'.⁵ Schiek calls this a 'troubling general exception' and writes that it 'is not clear how democratic society may require discriminatory measures'.⁶ Skidmore also finds this exception a 'most worrying permitted derogation from the equality principle'.⁷ He warns that, 'unless the Court of Justice is vigilant in restraining the use of this derogation, there is a risk that it could be used by Member States to perpetuate discrimination'. The widespread unease over the possible misuse of this paragraph demonstrates that the protection afforded by the Framework Directive is less strong than that afforded under the Race Directive and both new Equal Treatment Directives, which do not contain such a general exception clause; in other words, this 'get-out' clause puts the discrimination grounds of the Framework Directive lower in the hierarchy than race and sex.

With regards to the enforcement provisions, both Directives put a duty on Member States to make judicial and/or administrative procedures available to all persons who feel discriminated against. Both also provide that associations and organizations can support victims in bringing actions.⁸ But only the Race Directive (Article 13) puts a duty on Member States to 'designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'. The body/bodies should have as tasks: providing assistance to victims; conducting independent surveys; and publishing independent reports and making recommendations. There is no such duty in the Framework Directive, but both the new Equal Treatment Directives contain the same duty to designate a body or bodies with the same tasks.⁹ This means that Member States only have to designate such a body/bodies in the area of racial or ethnic

⁴ Bell, *Anti-Discrimination Law and the European Union*, 115.

⁵ Evelyn Ellis, 'The Principle of Non-Discrimination in the Post-Nice Era', in: A. Arnulf and D. Wincott, (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002) 291, 300.

⁶ Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?', 302.

⁷ Paul Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?', 30 *Industrial Law Journal* 126 (2001), 129.

⁸ See Article 7 Race Directive and Article 9 Framework Directive.

⁹ Article 7 Directive 2002/73 and Article 12 Directive 2004/113.

existence of a hierarchy, of different levels of protection, can lead to problems for two reasons. Firstly, because of the different levels of protection, there is the need to draw distinct lines between the different grounds, but this is not always easy, as some of the grounds are closely related. This is especially true for racial or ethnic origin and religion or belief. Secondly, different levels of protection can present a problem in cases of so-called multiple discrimination: where a person is discriminated against on two or more grounds. The fact that problems could arise from different levels of protection against discrimination on different grounds does not mean that all grounds should necessarily be treated in exactly the same way. There might be sound reasons to provide different levels of protection. These reasons are discussed in the next part.

§3. WHY DOES A HIERARCHY BETWEEN DISCRIMINATION GROUNDS EXIST AT THE EU LEVEL?

Why does EU law provide stronger legislative protection against discrimination on the grounds of racial or ethnic origin and sex than it does against discrimination on the other Article 13 EC grounds? Article 13 EC creates the competence for the Council to adopt legislative measures, but is silent on the means by which it should do this. As Ellis writes, 'no form of hierarchy is created by Article 13. Conversely, the Article does not mandate identical legislative treatment for each of the prohibited categories it enumerates'.¹¹

The European Commission spoke out against a hierarchy between the grounds in its Explanatory Memorandum to the Proposal for the Framework Directive¹²:

The scope of the present proposal covers all discriminatory grounds referred to in Article 13 EC except sex and does not rank them in any way. The absence of a qualitative hierarchy among the discriminatory grounds is of particular importance in cases of multiple discrimination.

¹¹ Ellis, 'The Principle of Non-Discrimination in the Post-Nice Era', 294.

¹² See COM (1999) 565, 6. In November 1999, the European Commission brought out a Communication (COM (1999) 564) and three proposals: COM (1999) 565, proposing the Framework Directive; COM (1999) 566, proposing the Race Directive; and COM (1999) 567, proposing a Council Decision establishing a Community Action Programme to combat Discrimination (2001–2006), to support the two Directives. The Framework Directive covered all the grounds of Article 13 EC, except sex. So it included racial or ethnic origin. This was because the proposals for the Directives 'are intended to be independent pieces of legislation that could stand alone. If one Directive were adopted by the Council before the other, the remaining proposal would be amended accordingly' (COM (1999) 564, 8). This was subsequently done: the Race Directive was adopted first and the Framework Directive was then amended so that it no longer covered racial or ethnic origin discrimination.

However, this opinion is not mirrored in the Proposals or the Directives, which show a clear hierarchy between the different grounds of discrimination. A number of reasons can be put forward to explain this hierarchy.¹³

A. POLITICAL PRAGMATISM

One reason that can explain the hierarchy is political pragmatism or realism. Article 13 EC requires unanimity within the Council for the adoption of legislative measures. This means that the adopted measures are a compromise, a product of negotiation between the Member States.¹⁴ At the time of the proposals for the Race and Framework Directives, there was a stronger political consensus on the need to take firm and wide-ranging action against racial discrimination. In the communication that accompanied the proposals¹⁵, the Commission explains that the proposal of a separate Directive against racial discrimination takes account of 'the strong political will which exists to take action to combat as many aspects as possible of racial discrimination'. This point of view was confirmed in a speech about the Article 13 proposals made by Hughes, a representative of the European Commission.¹⁶ She stated that the Commission 'wanted to make headway on all grounds' but it did not want 'to waste the opportunity to go further on racial discrimination, where it was deemed politically possible'. She added that there was no question about the seriousness of the Commission's commitment to discrimination on the other grounds.

Why was the political will to act against racial discrimination so strong at that time? Throughout Europe racial discrimination and manifestations of racial hatred were on the increase, and it was felt that this needed to be combated. In February 2000, the Freedom Party, an extreme right-wing party, became part of the government of Austria and this prompted the other EU Member States to make a stance against racism and racial discrimination. Or, as Goldston writes¹⁷, the Race Directive was 'given renewed political impetus by the electoral developments in Austria ... which prompted a number of EU member governments to offer tangible evidence of their commitment to combating racism'. Ellis also mentions the rise to power of the Freedom Party in Austria.¹⁸ She adds that:

¹³ See also Bell and Waddington, 'Reflecting on Inequalities in European Equality Law'.

¹⁴ See, for example, Adam Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination', 3 *European Journal of Migration and Law* 199 (2001).

¹⁵ COM (1999) 564, 8.

¹⁶ Kirsty Hughes, 'Article 13 – A Framework for Action', at the Conference *Ethnic Minorities in Europe: Rethinking and Restructuring Anti-discriminatory Strategies*, Birmingham, 17–19/02/2000, www.europa.eu.int/comm/dgs/employment_social/speeches/000217ad.pdf.

¹⁷ James Goldston, 'European Law: New Possibilities in the Fight against Discrimination', 13 *Interights Bulletin* 127 (2001), 127.

¹⁸ Ellis, 'The Principle of Non-Discrimination in the Post-Nice Era' 293

there was a perception among the Member States that some of the aspiring entrant states in central and eastern Europe posed serious problems in relation to racial, ethnic and religious tolerance, especially as far as the Roma were concerned. The Commission and the Member States took the view that it was vital to ensure that the *acquis communautaire* contained strong anti-discrimination legislation in good time before those states became members of the Union.

The United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which took place in Durban in August/September 2001, might have played a role as well. Preparations for this Conference were well under way when the Race Directive was negotiated. This put racism and racial discrimination more clearly on the political agenda and it also offered the opportunity for the EU and its Member States to show the world their genuine commitment to the fight against racism and racial discrimination.

This fight was also kept on the agenda of the EU by a large number of NGOs and by the European Parliament. Both had been lobbying very strongly for legislative action against racial discrimination since the mid-1980s. There was lobbying by NGOs and support from Parliament for action against discrimination on other grounds, but with less energy. The stronger and more sustained pressure for action against racial discrimination could also have influenced the stronger protection given to that form of discrimination.

The influence of political pragmatism and lobbying can be seen clearly in Directive 2004/113. The original proposal contained a prohibition of sex discrimination in the fields of media, advertising and insurance. The latter field was included because the Commission had come to the conclusion that 'differences of treatment based on actuarial factors directly related to sex are not compatible with the principle of equal treatment and should be abolished'.¹⁹ However, strong political lobbying by the media and insurance industry resulted in the exceptions laid down in Articles 3(3) and 5.²⁰

¹⁹ COM (2003) 657, Proposal for a Council Directive implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, 8. See also EU Press Release IP/03/1501.

²⁰ See, for example, Rupert Jones, 'Equality law will punish Female Drivers' *The Guardian* 20/04/2003 www.guardian.co.uk/business/story/0,,1195621,00.html; Comité Européen des Assurances, Press Release on Gender Equality in Insurance, Brussels, 5/11/2003; Sacha Prechal, 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes', 41 *Common Market Law Review* 533 (2004), 541; EU Press Release PRES/04/350; Aileen McColgan, *Discrimination Law Text, Cases and Materials* (2nd ed., Hart Publishing, 2005), 260; Eugenia Caracciolo di Torella, 'The Goods and Service Directive: Limitations and Opportunities', 13 *Feminist Legal Studies* 337 (2005), 2, 6.

B. INTERNATIONAL LAW

A second argument for giving greater protection against sex and race discrimination is that this is also done in international law. Many international human rights instruments prohibit discrimination on an extensive number of grounds, but there are specific UN Conventions against racial and sex discrimination: the International Convention on the Elimination of all Forms of Racial Discrimination (1966) and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

In the European context, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not rank the grounds on which discrimination is prohibited in any way. Article 14 contains a non-discrimination clause which prohibits discrimination in the enjoyment of the rights set forth in the Convention on 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The words 'any grounds such as' indicate that the list of grounds is not exhaustive and that other grounds can be considered as well. Article 14 does not suggest any difference in protection against discrimination on any of the grounds mentioned. However, in its determinations whether a difference of treatment contravenes Article 14, the European Court of Human Rights, established in Strasbourg to ensure that contracting States observe their obligations under the ECHR, appears to deal with certain grounds of discrimination in a different way. As de Schutter²¹ explains:

A certain hierarchy of grounds does appear in the case-law of the European Court of Human Rights: although, in most cases, a difference of treatment will pass the test of non-discrimination if it pursues a legitimate aim by means of presenting a reasonable relationship of proportionality with that aim, where differential treatment is based on a 'suspect' ground, it will be required that it is justified by 'very weighty reasons' and that the difference in treatment appears both suited for realizing the legitimate aim pursued, and *necessary* (his italics).

Although the ECHR itself does not rank the grounds, the European Court of Human Rights thus appears to maintain a hierarchy between different grounds of discrimination and it will scrutinize differences in treatment on suspect grounds more closely. I will come back to this later. Therefore, there are precedents in international law for giving stronger protection against some forms of discrimination than against others.

²¹ Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law Relevance for EU Racial and Employment Equality Directives*, DG Employment, Social Affairs and Equal Opportunities, Feb. 2005, 14 www.europa.eu.int/comm/employment_social/fundamental_rights/public/pubst_en.htm.

C. DIFFERENCES IN THE CHARACTER OF THE GROUNDS

The differentiation in protection could be based on substantive differences between the grounds. Bell and Waddington write that some grounds of discrimination can result in an individual being temporarily not available or not able to do a job or use a good or service.²² They make a distinction between grounds that are always irrelevant for the employment/access situation, like racial or ethnic origin, sexual orientation and gender, and grounds that are sometimes relevant. The latter category is subdivided between grounds that limit the availability to do a job or use a good or service, like gender in relation to maternity and religion with regard to times of worship, religious holidays and periods of pilgrimage; and grounds that can limit both the availability and the ability to do so, like age and disability. Schiek makes a different distinction²³; she discerns, firstly, characteristics that 'only exist as ascriptions – despite being construed as unchangeable', like race and gender and, partly, disability. Secondly, grounds which in part reflect real biological differences, such as sex, age and, under different aspects, disability. These characteristics 'may restrict the market value or employability of persons'. And, thirdly, grounds which reflect a chosen lifestyle or chosen difference in identity, like ethnicity or religion, sexual orientation or political conviction. The latter category presupposes that persons convey information about themselves, which allows categorization. It is questionable whether sexual orientation is something that a person can control and, also, whether sexual orientation discrimination only takes place when the person discriminated against conveys this information about him/herself. Discrimination on the grounds of a person's sexual orientation will often take place because a person is perceived to be homosexual. Gerards mentions the 'immutability of the personal characteristic used as a basis for the distinction' and suggests that 'immutability' should be given a broad interpretation 'as to mean all characteristics that cannot be changed without infringing the essence of an individual's identity'.²⁴ In this broad interpretation, sexual orientation and also, probably, religion, could be seen as immutable characteristics.

Other possible differences between the grounds that might have influenced the creation of a hierarchy are the size of the group affected, the disadvantage suffered by this affected group and the extent of the discrimination. All these factors are difficult to assess accurately, but it might be the perception that these differences exist that influences the decision on how to deal with the different grounds. The perception may lead to the conclusion that some grounds need to be dealt with more urgently than others or more extensively than others.

²² Bell and Waddington 'Reflecting on Inequalities in European Equality Law', 359.

²³ 'A New Framework on Equal Treatment of Persons in EC Law?', 309.

²⁴ Janneke Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 51 *Netherlands International Law Review* 135 (2004), 164.

This suggests that there are real (and possibly perceived) differences in character between the grounds for discrimination that could lead to differences in the level of protection provided against them.

D. OTHER DIFFERENCES

Bell and Waddington also mention differences in (hidden) goals between the grounds and greater familiarity with the grounds as possible other differences that could have influenced the way the protection was provided.²⁵ Another possibility is that non-legal policy measures were considered to be more effective for discrimination on some grounds.

1. *Goals pursued*

The Article 13 EC Directives mention as their purpose 'putting into effect the principle of equal treatment'. However, this is not further explained. McCrudden has pleaded for the recognition that different equalities are in play in different situations and that it is not always appropriate to develop common approaches for all forms of discrimination.²⁶ In other words, different grounds of discrimination could be used to emphasize different meanings of equality and to aim at achieving a different notion of equality. This might be a reason for the difference in the provision against discrimination on some grounds. But apart from a possible difference in the primary goal of equal treatment or equality, there could also be other (hidden) goals pursued by the Member States. I have already mentioned the desire to be seen as committed to combating racism and racial discrimination playing a role in the quick adoption of the Race Directive. There could also be economic reasons for anti discrimination legislation. For example, it could be deemed necessary to obtain greater participation of elderly and disabled people in the active workforce. This would cut down on benefits and might fill gaps left by the lower number of younger workers available.

2. *Differences in familiarity with the grounds*

Another explanation for the wider protection given to some grounds could be the fact that Member States were more familiar with legislative action against some forms of discrimination than against others. It is easier to agree to Community action in areas where national action has already been taken. Sex discrimination had been regulated by the EU since the seventies, so all the Member States were familiar with this. At the time

²⁵ Bell and Waddington, 'Reflecting on Inequalities in European Equality Law'.

²⁶ Christopher McCrudden, 'Theorizing European Equality Law', in Costello and Barry (eds.), *Equality in Diversity The New Equality Directives*, 1. See also, Bell and Waddington, 'Reflecting on Inequalities in European Equality Law', 350.

of the negotiations of the Race and Framework Directives, many Member States also had national legislation against racial discrimination. On the other hand, there were very few national laws against discrimination on the grounds of age.

3. *Differences in type of measures considered necessary*

The Equality Directives are legislative measures against discrimination. It could be that the Member States considered that for some forms of discrimination different policy measures would be more effective. Less (far-reaching) legislation and/or other policy measures could be seen as preferable. An example of this can be found in the Employment Guidelines, adopted under the Community Employment Strategy. Under the Employment OMC (Open Method of Coordination), the Council adopts annual guidelines for employment and the Member States make up National Action Plans to report on their progress towards these guidelines. The Council and the Commission then make up a joint Employment Report which monitors progress and sets priorities for the coming year. The Guidelines are not judicially enforceable, but instead depend on peer review and exchange of good practices in order to monitor progress towards agreed goals. The 1999 Guidelines consider that 'many groups and individuals experience particular difficulties in acquiring relevant skills and in gaining access to, and remaining in the labour market'. The Guidelines require the Member States to:

give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventive and active policies to promote their integration into the labour market.²⁷

Promoting integration and combating discrimination against people at a disadvantage in the labour market has been part of the guidelines since then.²⁸ The Employment Guidelines thus request the Member States to develop preventive and active policies to make up for the disadvantages suffered by groups and individuals who have been discriminated against because of disability, racial or ethnic origin or other grounds. The OMC could be used to set guidelines and targets for combating discrimination on a much wider range of discrimination grounds than the grounds mentioned in Article 13 EC.

It is submitted that the hierarchy, which exists at the EU level between the Article 13 EC grounds of discrimination, is the outcome of political pragmatism, rather than of any deliberate consideration of the needs of each individual ground. This is not really surprising, because Article 13 requires unanimity in the Council for the adoption of

²⁷ Council Resolution on the 1999 Employment Guidelines [1999] O.J. C 69/2, point I-9.

²⁸ See: Employment Guidelines [2000] O.J. L 72/15, guideline 9; [2001] O.J. L 22/18, guideline 7; [2002] O.J. L 60/60, guideline 7; and [2003] O.J. L 197/13, guideline 7.

measures against discrimination. One way of removing the hierarchy would be to extend the more extensive protection provided by the Race Directive to all the other grounds mentioned in Article 13 EC. But should all Article 13 EC grounds be dealt with in the same way? This is the question discussed in the next section.

§4. SHOULD A HIERARCHY EXIST?

Should there be differences in the protection against discrimination depending on the ground for that discrimination? First of all, it is important that the same key terms with the same definitions should be used for all provisions against discrimination no matter on what ground. Using different definitions of key terms like direct and indirect discrimination, harassment, victimization, genuine and determining occupational requirements etc. only leads to confusion and ambiguity. In addition, for some forms of discrimination special extra positive steps need to be taken to ensure that the protection afforded is effective. One example is the special protection for women as regards pregnancy and maternity (Articles 1(7) Directive 2002/73 and 4(2) Directive 2004/113). Another example can be found in Article 5 Framework Directive which requires that employers provide reasonable accommodation for people with disabilities. This Article continues:

This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

Recital 20 of the Preamble gives some examples of appropriate measures:

i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises or equipment, patterns of working time, the distribution of tasks or the provision of training or integrating resources.

This makes the protection of disabled people against discrimination more effective. Therefore, the definition of key terms should be the same for all Article 13 EC grounds, but there should be room for requiring positive steps to make the protection (more) effective.

In addition to a standardization of terminology, is it justified to make a difference in protection against discrimination depending on the ground for that discrimination? I have already mentioned that the European Court of Human Rights makes a distinction between suspect and non-suspect grounds of discrimination. I will suggest that the EU could make a more considered decision on the different levels of protection by using a

similar distinction. The European Court of Human Rights will scrutinize differences in treatment on suspect grounds more carefully, while it leaves a wider margin of appreciation in the case of other grounds. According to de Schutter, as quoted above, and Gerards²⁹, the European Court of Human Rights uses a 'very weighty reasons' test: very weighty reasons would have to be advanced before a difference in treatment on a suspect ground could be regarded as compatible with the Convention. But what does the Court mean by suspect and what determines whether a ground for discrimination is suspect? Gerards suggests a number of factors play a role in the considerations of the Court.³⁰ The main factors for deciding that a distinction should be strictly scrutinized are: a common ground of consensus between the Member States of the Council of Europe that a certain ground should not be a reason for a difference in treatment; the irrelevance of the personal characteristics used as a basis for the distinction; and the character and importance of the affected right, firstly for the democratic process and, secondly, for human dignity and personal autonomy. The nature and seriousness of the infringement has sometimes played a role as well. To determine whether there is a common ground of consensus, the Court will compare national legislation and case law and look at the international treaties that Member States have signed. Of the character and importance of the affected right, Gerards writes: 'if the right is fundamental in character, the Court will mostly apply a very strict test'.³¹ But are not all Convention rights fundamental or core rights? Gerards deduces from the case law that 'the Court seems to characterize aspects of Convention rights as core rights especially if they prove to be essential to the well functioning of a pluralistic and democratic society', and that, as a general rule, 'political rights and rights that are closely linked to human dignity belong to the core rights protected by the Convention'.³²

The European Court of Human Rights thus makes a differentiation between discrimination grounds by taking, among other things, the character and the importance of the affected right into account. Some grounds for discrimination concern core human rights – those rights that are strongly linked to human dignity or to the political process – and, because of this, the Court considers them suspect. Therefore they warrant providing a higher level of protection against discrimination. The Court has applied the 'very weighty reasons' test to illegitimacy³³, sex/gender³⁴, and nationality.³⁵ The Court held that 'particularly serious reasons' were needed to justify a distinction on grounds

²⁹ Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', 38.

³⁰ Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 162.

³¹ Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', 44.

³² *Ibid.*, 45. See also the case law referred to there.

³³ *Inze v. Austria*, 28/10/1987, Series A, 126, para 41 and *Mazurek v. France*, 1/02/2000, [2000] ECHR 48, para 49.

³⁴ *Abdulaziz, Cabales and Balkandali v. UK*, 25/05/1985, [1985] 7 ECHR 471, para 78 and *Burghartz v. Switzerland*, 22/02/1994, [1994] ECHR 2, para 27.

³⁵ *Gayus v. Austria*, 16/09/1996, [1996] ECHR 36, para 42.

of sexual orientation.³⁶ In the *Hoffmann* case,³⁷ the Court held that 'a distinction based essentially on a difference in religion alone is not acceptable', which implies, as Gerards writes, that the Court applies a very strict test to such a distinction. She continues that it is remarkable that the Court has not applied the very weighty reasons test to religious-based discrimination in later cases, such as *Thlimmenos* and *Palau-Martinez*.³⁸

Does the European Court of Human Rights consider race to be a suspect ground? De Schutter writes: '*obiter dicta* and common sense also suggest strongly that race and ethnic origin should be included in that list [of suspect grounds]'.³⁹ He refers to the *Jersild* case, where the Court emphasizes 'that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations'.⁴⁰ Gerards also mentions race as 'a ground that may easily be characterized as suspect'.⁴¹ It can be argued that the Court not only considers race as suspect, but that it takes racial discrimination as being particularly serious. In the *Timishev*⁴² case the court stated that 'racial discrimination is a particularly invidious kind of discrimination'. The Court has also held that 'discrimination based on race could of itself amount to degrading treatment within the meaning of Article 3'.⁴³ This suggests that the Court considers race to be an especially suspect ground. On the other hand, the Court appears to have been very unwilling to find a violation of Article 14 on grounds of racial discrimination. The *Nachova*⁴⁴ case in 2004 was the first case in which such a violation was found. In both the *Moldovan*⁴⁵ and the *Timishev*⁴⁶ cases, the Court also found racial discrimination to be in breach of article 14. However, in *D.H. and Others v. Czech Republic*⁴⁷ no violation was found. The Court's treatment of racial discrimination is thus not always consistent.

Despite a seeming inconsistency of application by the Strasbourg Court, could the distinction between suspect and non-suspect grounds be used to decide which grounds of discrimination should receive more extensive protection in EU legislation? I would suggest that it could, although I do not argue that the EU should follow the European Court of Human Rights in every detail. It should be kept in mind that the Strasbourg

³⁶ *Lustig-Prean and Beckett v. UK*, 27/09/1999, [1999] ECHR 71, para 83, and *Karner v. Austria*, 24/07/2003, [2003] ECHR 395 para 37.

³⁷ *Hoffmann v. Austria*, 23/06/1993, [1993] 17 ECHR 293, para 36.

³⁸ Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 165, footnote 120. *Thlimmenos v. Greece*, 06/04/2000, [2000] ECHR 162 and *Palau-Martinez v. France*, 16/12/2003, [2003] ECHR 693.

³⁹ De Schutter, *The Prohibition of Discrimination under European Human Rights Law Relevance for EU Racial and Employment Equality Directives*, 15.

⁴⁰ *Jersild v. Denmark*, 23/04/1993, [1994] ECHR 33, para 30.

⁴¹ Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', 26.

⁴² *Timishev v. Russia*, 13/12/2005, [2005] ECHR 858, para 56.

⁴³ See *East African Asians v. the UK*, Commission Report, 14/12/1973, [1973] 3 ECHR 76. The Court referred to this case and repeated this in *Moldovan and Others v. Romania No. 2*, 12/07/2005, [2005] ECHR 473, para 111.

⁴⁴ *Nachova and Others v. Bulgaria No. 2*, 26/02/2004, [2004] ECHR 90.

⁴⁵ *Moldovan and Others v. Romania No. 2*, 12/07/2005, [2005] ECHR 473.

⁴⁶ *Timishev v. Russia*, 13/12/2005, [2005] ECHR 858.

⁴⁷ *D.H. and Others v. Czech Republic*, 07/02/2006, [2006] ECHR 113.

Court uses the distinction when deciding on the level of scrutiny it should exercise; in other words, when deciding on how wide a margin of appreciation should be left to the Member States. I suggest that the EU legislators instead make a considered choice about the level of protection that needs to be provided for each Article 13 EC ground and that they could do so by making certain grounds into suspect grounds, using the criteria used by the European Court of Human Rights. Thus, a suspect ground would be a ground that affects core human rights – those rights that are strongly linked to human dignity or to the political process – and would warrant protection in a wider area, with limited and precisely prescribed exceptions.

It is submitted that a distinction between suspect grounds and other grounds of discrimination could be used at EU level to justify differences in the protection provided. This would lead to a more considered hierarchy of discrimination grounds. The following takes this approach in looking at possible future developments.

§5. DEVELOPMENTS AT THE EU LEVEL

In terms of common ground, the common ground of consensus is already required at the EU level, because Article 13 EC requires unanimity in the Council: all Member States have to agree which grounds are covered and in which areas these are covered. In 2000, they agreed on the protection against discrimination on the different Article 13 grounds as laid down in the Race and Framework Directives. In this sense, you could say that the EU has made race into a suspect ground. Sex was already made a suspect ground by earlier legislation, but only in relation to the employment fields covered by Directive 2002/73. These grounds need special protection in the fields mentioned in the Directives and the margin of appreciation left to the Member States in relation to this protection is less wide, as the provisions allow only very limited exceptions. A wider margin of appreciation appears to be afforded by Directive 2004/113 in relation to sex discrimination in access to and supply of goods and services. The Framework Directive gives less protection against discrimination on the grounds of religion and belief, disability, age and sexual orientation than the protection provided against race and sex discrimination, so the grounds covered by this Directive were not made into suspect grounds.

But is it likely that the EU will make any changes in the existing provisions in the near future and so make more of the Article 13 EC grounds into suspect grounds? In May 2004 the European Commission brought out a Green Paper on equality and non-discrimination in an enlarged EU.⁴⁸ It expressed approval of the fact that some Member States had gone beyond the minimum standards set out in Community legislation by extending the protection beyond employment to discrimination on the grounds of

⁴⁸ COM (2004) 379; Green Paper on Equality and Non-discrimination in an Enlarged European Union.

religion and belief, disability, age and sexual orientation and/or by opting for a single framework addressing all grounds. Many Member States had established single equality bodies dealing with all the grounds of discrimination covered by the Directives. But, as Waddington writes:

The Commission clearly regards such developments as positive, yet in spite of having the legal competence to propose (new) legislation to extend the scope of non-discrimination protection beyond employment, or require the establishment of equality authorities for the grounds currently falling under the Framework Employment Directive, it has not yet done so, and has no plans to do so in the immediate future. The reason for this reluctance is arguably the poor response of some Member States to the current Article 13 Directives and the anticipated difficulties of securing the adoption of future such Directives.⁴⁹

Following on from the Green Paper, the Commission issued, in June 2005, a Communication containing a framework strategy for non-discrimination and equal opportunities for all.⁵⁰ According to this, 'the Commission is not proposing to come forward at this stage with further legislative proposals based on Article 13 of the Treaty', but it would 'undertake an in-depth study into the relevance and feasibility of possible new measures to complement the current legal framework'. The results of this study would be made available in Autumn 2006 but have not, as of November 2006, been forthcoming.⁵¹ New legislation is, therefore, unlikely to be proposed before 2007, and, even if the scope of the Framework Directive were to be extended beyond the employment sphere, this extension could be limited in the same way that the scope of Directive 2004/113 has been limited by allowing for far-reaching exceptions. As mentioned, the text of the latter Directive is a much watered-down version of the original proposal. Proposals to extend the scope of the Framework Directive might well fall victim to the same fate.

If no new legislation is proposed in the near future, the duty to designate a specialist body or bodies will not be extended to the grounds covered by the Framework Directive. Yet, there appears to be no sound reason why victims of sex and racial or ethnic origin discrimination need such a body more than victims of discrimination on the other grounds.

⁴⁹ Waddington, 'Taking Stock and Looking Forward: The Commission Green Paper on Equality and Non-discrimination in an Enlarged European Union', 33 *Industrial Law Journal* 367 (2004), 369.

⁵⁰ COM (2005) 224, Communication from the Commission, Non-Discrimination and Equal Opportunities for All – A Framework Strategy.

⁵¹ *Ibid.* 6.

§6. SHOULD THERE BE MORE SUSPECT GROUNDS IN EU LAW?

EU law has made race a suspect ground by providing stronger protection while sex has been made a suspect ground in the employment related fields mentioned in Directive 2002/73, but not in the provision of goods and services. If a suspect ground for discrimination warrants the provision of stronger protection, should there be more suspect grounds in EU legislation? In the following the desirability of an extension in the number of suspect grounds is discussed for each ground in turn. 'Stronger protection' will be understood as covering more areas and, even more importantly, as allowing for very limited and strictly circumscribed exceptions to the rule that unfavourable treatment on the prohibited ground will constitute discrimination.

A. SEX

The European Court of Human Rights considers sex to be a suspect ground of discrimination and there appears to be no compelling reason why the EU should not follow this and make sex a suspect ground in all areas in which sex discrimination is prohibited. The protection against sex discrimination should also be extended to all areas covered by the Race Directive, as there should be no difference in protection against discrimination on these grounds.

Although Directive 2004/113 extended the areas in which discrimination on the grounds of sex is prohibited to include access to and supply of goods and services, it does not cover social protection⁵², social advantages and taxation (which was lobbied for and included in an earlier draft). It explicitly excludes discrimination in the fields of education, media and advertising and contains an exception in relation to insurance.⁵³ It also allows for justification of direct discrimination. Because of this, the protection afforded is considerably lower than that provided against sex discrimination in the employment sphere and against race discrimination by the Race Directive. It is submitted that the exceptions are excessively broad and over-general and that justification of direct discrimination, which was not provided for in the proposal for the Directive⁵⁴, should not be allowed. An exception on the lines of Article 1(3) of that proposal would be sufficient to cover situations where goods and services are specifically designed for use

⁵² Although healthcare appears to be covered where this is a service for the purposes of internal market law. See also Recital 12.

⁵³ See McColgan, *Discrimination Law Text, Cases and Materials*, 260.

⁵⁴ COM (2003) 657, Proposal for a Council Directive implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services.

by members of one sex or where the same skills may be practiced differently depending on whether the customer is a man or a woman.⁵⁵ That Article determined that:

This Directive does not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods and services are intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex.

Alternatively, an exception could be created based on the genuine and determining occupational requirements exception contained in Articles 4 Race Directive, 4(1) Framework Directive and 1(6) Directive 2002/73:

Genuine and determining requirements of the particular activities or provisions

Notwithstanding the prohibition of direct and indirect discrimination, Member States may provide that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination, where, by reason of the nature of the particular activities or provisions concerned or in the context in which they are carried out, such a characteristic constitutes a genuine and determining requirement of the activities or provisions, provided that the objective is legitimate and the requirement is proportionate.

B. RELIGION AND BELIEF

Religion and belief should become a suspect ground in EU law and the protection against such discrimination should be extended to cover all areas covered by the Race Directive, because it is a characteristic that does not affect a person's ability to do a job or use a good or service and, in the broad interpretation suggested by Gerards, can be seen as an immutable characteristic that cannot be changed easily without infringing the essence of an individual's identity.⁵⁶ I would therefore suggest that the protection against discrimination on this ground should be the same as against racial or ethnic origin discrimination. Two main reasons lie behind this view: firstly, discrimination on the ground of religion or belief more often than not involves a breach of the core human right to freedom of religion; and, secondly, religion is often closely related to racial and ethnic origin and it can be difficult to draw a distinction between the two. Racial discrimination may be interwoven with discrimination on grounds of a person's adherence to a minority religion or ethnicity. For these reasons, religion or belief

⁵⁵ See the explanation for Article 1 in the Preamble, COM (2003) 657, Proposal for a Council Directive implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, 9.

⁵⁶ See above under 3C and note 24.

should, in my view, be added to the grounds in the Race Directive. This would make religion or belief another suspect ground in EU law and would fit in with General Policy Recommendation 7 of the European Commission against Racism and Intolerance (ECRI).⁵⁷ This Commission, a Council of Europe body, recommends that the Member States of the Council of Europe – these include all 25 present EU Member States – enact legislation against racism and racial discrimination and gives key components of such legislation.⁵⁸ Under ‘racial discrimination’ the Recommendation includes ‘differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin’.⁵⁹ It is surprising that the European Court of Human Rights is ambivalent about religion as a suspect ground, when the inclusion of religion in the definition of racial discrimination in the ECRI Recommendation appears to indicate that the Council of Europe does not differentiate between religious and racial discrimination.

Religious discrimination is prohibited by the Framework Directive, which contains, as the Race Directive does, an exception for genuine and determining occupational requirements. Article 4(2) adds a further exception for occupational activities of churches and other organizations with an ethos based on religion or belief. This allows religious organizations to take religion and belief into account in recruitment decisions where national law or practice allows this already, but this ‘should not justify discrimination on any other ground’. Article 4(2) also determines that, in regard to existing employees, religious organizations can ‘require individuals working for them to act in good faith and with loyalty to the organization’s ethos’. But the extent of this obligation remains unclear. Is this second paragraph with the additional exception really necessary? According to Waddington, it seems to be totally unnecessary as the exclusion seems to fall within the scope of Article 4(1).⁶⁰ Ellis also questions whether Article 4(2), which she describes as ‘one of the most opaque to be found on any statute book’, adds anything to Article 4(1).⁶¹ This suggests that the exception for genuine and determining occupational requirements should be sufficient and that Article 4(2) should be removed from the Directive. However, if the Race Directive is extended to cover religion and belief, then the exception for genuine and determining occupational requirements should be extended in the same way as was suggested above in relation to sex discrimination to cover the provision of education in religious schools.

⁵⁷ European Commission against Racism and Intolerance, General Policy Recommendation 7, *National Legislation to Combat Racism and Racial Discrimination*, CRI(2003)8, (Strasbourg Council of Europe, 2003).

⁵⁸ *Ibid.*, 8.

⁵⁹ *Ibid.*, Paragraph 1(b).

⁶⁰ Waddington, ‘Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive’, 179.

⁶¹ Evelyn Ellis, *EU Anti-Discrimination Law* (Oxford University Press, 2005), 283.

The only argument against treating discrimination on the ground of religion and belief the same as that on the ground of race would be that racial or ethnic origin and religion or belief as grounds are slightly different in character. If we take Bell and Waddington's distinction based on a person's ability or availability to do a job or use a good or service, then the two grounds are different: a person's race will not affect this, but his/her religion can affect his/her availability.⁶² The inclusion of a duty to make reasonable accommodation in case of religion would solve this problem. For example, providing a place and time for religious worship and adapting patterns of working time could prevent discrimination on religious grounds.⁶³ If the above changes were made, there would be no reason why the Race Directive could not also cover discrimination on the ground of religion or belief.

C. DISABILITY

The European Court of Human Rights does not consider disability to be a suspect ground and the EU should follow this. Disability can affect both the ability and the availability of a person to do a job or use a good or service, and, therefore, exceptions to the prohibition of discrimination will be necessary. The EU legislator appears to have recognized this, as Preamble 17 to the Framework Directive states that:

This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable or available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

Therefore, this Preamble recognises that some jobs cannot, even with reasonable accommodation, be done by people with a certain disability. For example, a person in a wheelchair will not be able to do the job of fireman. Preamble 18 confirms this by determining that the armed forces, the police, prison or emergency services do not have to recruit or maintain in employment persons who do not have the required capacity. However, Article 3(4) Framework Directive, which provides that the Directive, in so far as it relates to disability and age discrimination, does not apply to the armed forces, goes further. It provides a 'blanket defence, covering all jobs in the armed forces, even desk jobs for which youth and complete physical health would not appear to be essential'.⁶⁴

⁶² Bell and Waddington, 'Reflecting on Inequalities in European Equality Law', 359.

⁶³ It is suggested that the provision to make reasonable accommodation would be extended to both religious and age discrimination, as in both cases it could be useful. See further: Waddington, 'Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive', 178; Bell and Waddington, 'Reflecting on Inequalities in European Equality Law', 360.

⁶⁴ Ellis, 'The Principle of Non-Discrimination in the Post-Nice Era', 301.

There seems to be no need for this blanket exception for either disability or age and it should be removed or replaced by a paragraph similar to Preamble 18.

As with all the grounds covered by the Framework Directive, the prohibition of disability discrimination is limited to the employment sphere. Should this prohibition be extended beyond that sphere? The Economic and Social Committee recommended an extension 'in the areas of access to services, education and transport'.⁶⁵ There is no reason why the legislation against disability discrimination should not be extended to these areas. However, the already mentioned duty to provide reasonable accommodation should be applicable in these other areas as well. According to Article 5 Framework Directive, this duty is not unlimited: it exists 'unless such measures would impose a disproportionate burden on the employer'. In other words, there is a balancing of the interest of the disabled person and the burden on the employer. If the protection is extended beyond employment, this balancing of interests should also be possible in the other areas, although more detailed provisions might be necessary to indicate how far this duty extends.

Article 18 Framework Directive determines that the Directive must be implemented by 2 December 2003. But Member States could 'in order to take account of particular conditions', have an additional three years to implement the provisions against age and disability discrimination. There is no explanation in the Preamble why this is so or what the 'particular conditions' could be. The Member States who wanted to make use of the extension had to notify the Commission. Three of the 15 'old' Member States⁶⁶ made use of the extension in relation to disability: only France notified the Commission that it planned to take the full three years, while the UK and Denmark took one extra year.⁶⁷ The fact that only one Member State made use of the full three years suggests that it was not really necessary to provide a different deadline here.

D. AGE

The European Court of Human Rights does not consider age to be a suspect ground and age should not become a suspect ground in EU law either.⁶⁸ Age is a characteristic that

⁶⁵ Opinion of the Economic and Social Committee on COM (1999) 564; COM (1999) 565; COM (1999) 566; and COM (1999) 567 [2000] O.J. C204/82, in 2.5.

⁶⁶ This refers to the states that were Members before 1 May 2004. On that date, ten new states joined the Union.

⁶⁷ See European Network of Legal Experts in the Non-Discrimination Field, *European Anti-Discrimination Law Review*, Issue 1, April 2005 www.migpolgroup.com, 31. For the 'new' Member States the deadline was later. All ten have notified the Commission that they have implemented both the Race and Framework Directives for all grounds covered.

⁶⁸ The ECJ's holding in the *Mangold v. Helm* case that 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law' does not change the opinion expressed here that age should not be considered as a suspect ground in EU law (Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981). It is my opinion that the consideration given in *Mangold* is an expression of a more general principle of equality and non-discrimination. The ECJ has consistently held that the

can affect both the ability and the availability to do a job or use a good or service, and exceptions will remain necessary.

Age as a ground for discrimination can be said to be currently at the bottom of the hierarchy, mainly because of the extensive exceptions the Framework Directive contains. Article 6(1) determines that:

differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

In other words, even direct age discrimination can be justified. As we have seen, the only other general justification of direct discrimination can be found in Directive 2004/113. As Waddington and Bell write, this exception is 'qualitatively different' from that provided for the other grounds, where the principle is that direct discrimination can never be justified except in cases specifically mentioned by the legislation in question. The Framework Directive 'provides an open-ended possibility for Member States to justify direct age discrimination'.⁶⁹ 'Legitimate employment policy, labour market and vocational training objectives' can all be legitimate aims, but these are not clearly defined. Article 6 continues that 'such differences of treatment may include, among others...' and then gives some examples. From the 'among others' it is clear, that this list of examples is non-exhaustive. Article 6(2) contains an exception in relation to social security schemes. It is thus not very clear, where the limits of all these exceptions lie.

In addition, here again there is no need for the blanket exception for the armed services. The deadline for implementation of the Framework Directive as regards age discrimination has also been extended by three years. In this case, more Member States have made use of this extension. Of the 'old' Member States, Belgium, Germany, the Netherlands, Sweden and the UK have notified the Commission that they will use the

principle of equality and non-discrimination is a fundamental principle of Community law (see, *inter alia*, Case C-1/72, *Frilli v. Belgium*, [1972] ECR 457, Case C-117/76, *Ruckdeschel and others*, [1977] ECR 1753, Case C-43/75, *Defrenne v. Sabena*, [1976] ICR 547). In the *Karlsson* case (Case C-292/97, *Karlsson and others*, [2000] ECR I-2737) the ECJ held that the fundamental rights in the Community legal order include a general principle of equality and the obligation not to discriminate. Therefore, it seems to me that the principle of non-discrimination in respect of age is part of, or is an expression of the more general principle in Community law that applies to all grounds of discrimination. Thus the Court's ruling in *Mangold* was an expression of the general principle of equality and non-discrimination laid down in Articles II-80 and II-81 of the Draft Constitution/ European Charter of Fundamental Rights, and which includes all Article 13 EC grounds as well as a number of other grounds. For this reason, the *Mangold* judgement has not been covered in this article.

⁶⁹ Waddington and Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', 599.

three-year extension, while Denmark has asked for one year. The majority of Member States have, however, not made use of this extension.

Should age discrimination be extended beyond what is provided by the Framework Directive? Some of the exceptions mentioned above appear to be unnecessarily over-general, like the blanket exception for the armed services or the justification on grounds of 'employment policy' or 'labour market objectives'. These provisions should be more restricted. Another improvement would be to extend the provision for reasonable accommodation to include age. The prohibition could be extended to include other areas covered by the Race Directive, but exceptions will remain necessary.

E. SEXUAL ORIENTATION

Like the European Court of Human Rights, the EU should consider sexual orientation as a suspect ground of discrimination because a person's sexual orientation does not affect his/her ability or availability to do a job or use a good or service. Discrimination on the ground of a person's sexual orientation can be seen as a breach of the core human right to respect for private life. This appears to be the reason why the European Court of Human Rights considers sexual orientation to be a suspect ground, despite the fact that there is considerable difference of opinion about sexual orientation as a ground for discrimination between the Member States of the Council of Europe (and of the EU).

The Framework Directive does not contain any specific provisions or exceptions that are applicable to sexual orientation discrimination only, but the general justification clause of Article 2(5) is also applicable here. In fact, as seen above, this paragraph was added to reassure that protection against sexual orientation discrimination would not be taken as protecting paedophiles or other sexual offenders. Preamble 22 to the Framework Directive can also have an impact here. It determines that 'this Directive is without prejudice to national laws on marital status and the benefits dependent on them'. This could lead to direct or indirect discrimination on the grounds of sexual orientation. If a marital benefit is given to both married and unmarried partners, but not partners of the same sex, then this constitutes direct discrimination on the ground of sexual orientation. If a benefit is limited to married partners, this would be indirect discrimination as in most EU Member States lesbians and gay men cannot marry their partners. (Only the Netherlands, Belgium and Spain recognize same sex marriages.)

The exception in Article 4(2) Framework Directive could also lead to discrimination on the grounds of sexual orientation. This article makes, as mentioned, an exception for employment in 'churches or other public or private organizations the ethos of which is based on religion or belief'. Bell discusses the connections between this article and sexual orientation discrimination.⁷⁰ He writes that the Article does not 'permit a religious organization to simply (and overtly) exclude all lesbians and gay men from access to

⁷⁰ Bell, *Anti-Discrimination Law and the European Union*, 116.

employment'. Article 4(2) also prescribes that, if religion or belief is taken into account in recruitment decisions, regard must be had to the specific occupation in question. The extent of the requirement 'to act in good faith and with loyalty to the organization's ethos' is not made clear. Therefore, Article 4(2) could well be used by organizations with a religious ethos to justify unequal treatment of lesbians and gay men. This is another reason why Article 4(2) should be removed from the Framework Directive.

§7. CONCLUSION

In this paper, I have argued that a hierarchy of discrimination grounds exists within the EU legislative framework against discrimination, with racial or ethnic origin at the top, sex just below that, religion and belief, disability and sexual orientation even lower and age at the bottom. Of the suggested explanations for this hierarchy, political pragmatism appears to have played the most influential role at the EU level. Unanimity is required for the adoption of measures on the basis of Article 13 EC. That it was possible to reach a consensus on a wide-ranging directive against racial or ethnic origin discrimination was influenced by the circumstances at the time of adoption, which made Member States want to show their commitment to combating racism and racial discrimination and by the very strong lobby for action. Not to take advantage of the favourable mood towards wider-ranging action against racial discrimination would have been 'to waste the opportunity to go further on racial discrimination'.⁷¹ O'Hare sums this up well where she writes that the way in which the protection against discrimination on different grounds is provided is 'reflective of a compromise based on the different levels of progress and commitment to certain forms of discrimination amongst the Member States at this point'.⁷²

I have suggested that maintaining a hierarchy of legal protection at EU level is justified, but that this hierarchy should be based on whether a ground for discrimination should be considered suspect or not, using the distinction made by the European Court of Human Rights. A ground should be considered suspect if it concerns a core human right which is strongly linked to human dignity or to the political process. If a ground is suspect, the EU legislation should cover a wide area and contain only limited and prescribed exceptions, thus leaving less to the discretion of the Member States. In other words, the law should accord a narrower margin of appreciation to the Member States. The discussion has been limited to the Article 13 EC grounds, which are covered by EU legislation and the question whether other (suspect or non-suspect) grounds of discrimination should be legislated against within the EU has not been touched upon for reasons of space. Of the Article 13 EC grounds of discrimination, sex, racial or ethnic origin, religion or belief and sexual orientation should be considered as suspect grounds,

⁷¹ Hughes, 'Article 13 – A Framework for Action'.

⁷² O'Hare, 'Enhancing European Equality Rights: A New Regional Framework', 144.

but disability and age should not, although for the latter two the present provisions should be extended to other areas and the present exceptions should be more restricted. On the other hand, the (positive) provision to make reasonable accommodation should be extended beyond the employment sphere and should cover age and religion as well as disability.

In summary, differences in the protection against discrimination on different grounds can be justified and a different approach towards different grounds of discrimination might well be the most effective, because there are genuine differences between the grounds. Some grounds can be seen as suspect grounds and in that case the margin of appreciation left to the Member States should be limited, while a broader margin of appreciation can be given in relation to other grounds. However, the differentiation made in legislation at EU level does not appear to have been the product of a careful discussion of the needs of each separate ground, but rather the product of political pragmatism. Yet, without this political pragmatism, we might never have had such an extensive legislative protection against racial discrimination.